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ARIZONA SUPERIOR COURT
PIMA COUNTY

Richard Rodgers, et al.,

Plaintiffs,

vs.

Charles H. Huckelberry, et al.,

Defendants.

Case No. C20161761

**STATEMENT OF FACTS IN
SUPPORT OF SECOND MOTION
FOR PARTIAL SUMMARY
JUDGMENT REGARDING COUNTS
3 AND 4**

(The Honorable Catherine Woods)

Defendants (collectively, “the County”) provide the following Statement of Facts in support of their Second Motion for Partial Summary Judgment Regarding Counts 3 and 4:

Introduction

1. On January 19, 2016, the Pima County Board of Supervisors (voting 4-1) awarded the two contracts that are challenged in Counts 3 and 4 of Plaintiffs’ Complaint: a contract for architect services to Swaim Associates, Ltd. (“Swaim”) and a contract for construction-manager-at-risk (“CMAR”) services to Barker Morrissey Contracting, Inc. (“Barker”). (**Exhibit 1**, Excerpts from Minutes of January 19, 2016 Board of Supervisors Meeting, at pimacounty00022-23; **Exhibit 2**, Swaim

- 1 Contract (without exhibits); **Exhibit 3**, Barker Contract (without exhibits).)
- 2 2. Those contracts, generally speaking, were for the design (Swaim) and construction
- 3 (Barker) of a headquarters and manufacturing facility (“Facility”) to be lease-
- 4 purchased by World View Enterprises, Inc. (“World View”) and an adjacent
- 5 public balloon launch pad (“Launch Pad”) for use by World View and other users.
- 6 (See **Exhibit 4**, at 4-5, 7-8.)
- 7 3. Though Pima County has been seriously promoting economic development since
- 8 at least 2013, it had never done an economic-development deal like the one it did
- 9 with World View. (**Exhibit 7**, Excerpts from Depo. of C.H. Huckelberry, at 102:4-
- 10 103:5.)
- 11 4. In general, a competitive, qualifications-based process is required to procure
- 12 architect and CMAR services (*see* A.R.S. § 34-603; *see also* **Exhibit 7**, at 14:18-
- 13 16:6), a process that itself can take 2-4 months. (**Exhibit 6**, Excerpts from Depo.
- 14 of John Moffatt, at 84:23-85:4 (60 to 90 days); **Exhibit 9**, Excerpts from Depo. of
- 15 Phil Swaim, at 6:18-7:19 (3 to 4 months).)
- 16 5. The Board directly selected Swaim and Barker under A.R.S. § 34-606 because of
- 17 “due to the compressed timeframe for design and construction of [the Facility and
- 18 Launch Pad], compliance with the full provisions of [A.R.S. Title 34] is
- 19 impracticable and contrary to the public interest.” (**Exhibit 4**, January 19, 2016
- 20 Board of Supervisors Memorandum, at 7-8.)
- 21 6. Plaintiffs challenge the procurements of the architect and CMAR services here,
- 22 contending they reflect a “predetermined selection” by County Administrator C.H.
- 23 Huckelberry under which the County “agreed to an accelerated
- 24 design/construction schedule,” chose its “preferred contractors,” and “used World
- 25 View’s demand for occupancy and use” of the Facility and Launch Pad as the
- 26 “rationale” for the direct selection. (**Compl.** ¶¶ 85, 87-88, 92, 94-95.)

World View's Discussions with County Staff

7. World View is a Tucson-based near-space exploration company that manufactures high-altitude balloons for research and scientific purposes, as well as potential tourism flights in the future. (**Exhibit 4**, at 1-2.)
8. In 2014-2015, World View explored the establishment of a new corporate headquarters, manufacturing, and launch facility. (*See* **Exhibit 6**, at 14:22-16:3, 50:20-51:15.)
9. It first approached County staff in September 2014 with some conceptual plans to locate in an existing facility at the Tucson International Airport, but that proposal never came to fruition. (**Exhibit 5**, Excerpts from Depo. of Patrick Cavanaugh, at 8:5-7, 9:21-11:5, 16:14-21, 23:12-16, 24:2-8.)
10. During the summer of 2015, World View began discussions with County about a new facility, which led to a proposal in which the County would construct the Facility and Launch Pad on a County-owned parcel and World View would lease-purchase the Facility and operate and use the Launch Pad. (*See* **Exhibit 5**, at 22:15-24:25.)
11. Throughout the 2015 discussions, World View representatives were "emphatic" that its new facility had to be "up and running by the end of the year 2016" due to a project for a then-undisclosed client, which turned out to be NASA. (**Exhibit 6**, at 53:17-54:18.)

Pima County's Competitors

12. At the same time, the County faced serious competition from other jurisdictions for World View's Facility. (**Exhibit 6**, at 54:23-55:9, 82:5-83:6.)
13. County staff understood that there were existing facilities in both Florida and New Mexico that could be made available to World View. (**Exhibit 6**, at 55:6-9; **Exhibit 7**, at 104:21-105:3.)

1 14. Indeed, in September 2015, while discussions with County staff were ongoing,
2 County staff also understood that World View representatives were traveling to
3 Florida “to identify exactly what the deal [was] that Florida was going to offer.”
4 (**Exhibit 6**, at 82:5-19.)

5 **Swaim and Barker Get Involved**

6 15. In August 2015, County Administrator C.H. Huckelberry indicated a need for
7 preliminary design and cost information for the Facility and Launch Pad. (**Exhibit**
8 **6**, at 26:12-30:14.)

9 16. Mike Hammond, a realtor with World View, suggested Swaim for preliminary
10 design services, and Swaim began providing those services to World View in
11 August 2015. (**Exhibit 6**, at 29:8-30:2, 30:22-25, 74:13-20; **Exhibit 8**, Excerpts
12 from Depo. of Brian Barker, at 13:1-3, 13:13-14:2; **Exhibit 9**, at 8:4-17.)

13 17. Swaim then contacted Barker to obtain cost estimates. (**Exhibit 8**, at 13:17-14:2;
14 *see also* **Exhibit 9**, at 14:18-15:13.)

15 18. A November 2, 2015 memorandum from Mr. Huckelberry to Deputy County
16 Administrator Tom Burke contains the following statement: “In our initial
17 meetings with World View, it is clear that they had no structure regarding design
18 and cost parameters for a new manufacturing facility. I suggested they work with
19 Swaim and Associates Architects and Barker Morrissey Contracting.” (**Exhibit**
20 **10**, Memorandum from C.H. Huckelberry to Tom Burke (11/2/2015).)

21 19. Mr. Huckelberry explained, however, that Swaim was already involved in the
22 proposed project, and he did not suggest Barker. (**Exhibit 7**, at 60:1-61:1, 62:5-
23 21.)

24 20. Over the course of the next few months, Swaim provided preliminary design
25 services and Barker provided preliminary cost estimates, both without charge.
26 (**Exhibit 8**, at 25:6-10, 64:17-19; **Exhibit 9**, at 10:14-12:1, 14:18-23, 19:16-23,

1 35:7-18, 41:2-19, 56:19-21.)

2 21. Swaim and Barker worked without charge, not only because it is common in their
3 industries to do preliminary work for free in the hopes of getting the job if the
4 project goes forward (*see Exhibit 8*, at 15:7-17 (“[W]e do this all the time,
5 providing estimates for clients, and we’re not always the contractor until we get
6 the contract.”); *Exhibit 9*, at 26:18-27:22 (“[E]arly on, it’s not unusual [to do work
7 without charge]. . . . [E]ventually yes, the goal is to be able to charge for work.”)),
8 but also because they wanted to help Pima County retain World View for the
9 benefit of the local economy (*Exhibit 8*, at 25:18-26:3; *Exhibit 9*, at 35:7-18 (“Q.
10 And why did you do it for no money? A. Community service.”)).

11 22. Barker had prior experience building large metal buildings. (*Exhibit 8*, at 80:16-
12 82:5.)

13 23. Swaim is “probably the largest architectural firm in town and ha[d] the capability
14 to . . . assist” with the World View project. (*Exhibit 9*, at 35:19-36:1.)

15 24. Swaim also had recently worked on a \$120 million integrated medical facility for
16 the University of Arizona. (*Exhibit 9*, at 69:18-70:18.)

17 25. Brian Barker has met Mr. Huckelberry, but “d[oesn’t] even know if I could say I
18 know him.” (*Exhibit 8*, at 12:10-14.)

19 26. Mr. Barker has not worked with Mr. Huckelberry or his staff on prior projects.
20 (*Exhibit 8*, at 12:15-17.)

21 27. Phil Swaim knows Mr. Huckelberry well, and has known him since the 1990s, but
22 does not typically work directly with him on County projects. (*Exhibit 9*, at 9:11-
23 20.)

24 **World View’s Decision**

25 28. Between August and November 2015, it was by no means clear that World View
26 would agree to the County proposal.

- 1 29. On October 23, 2015, Mr. Huckelberry sent World View a proposal in writing that
2 provided for, among other things, occupancy by World View in 2017. (**Exhibit 7**,
3 at 69:9-15; *see also* **Exhibit 19**, October 23, 2016 Letter from C.H. Huckelberry to
4 Jane Poynter.)
- 5 30. As of November 2, 2015, the County Administrator understood that World View
6 was still considering relocating to Florida, which was offering significant
7 incentives. (**Exhibit 7**, at 103:23-105:22.)
- 8 31. While the County Administrator authored a memorandum on November 2, 2015,
9 inquiring about the procurement process necessary to select Swaim as architect, at
10 that time World View had not decided whether it would stay in Pima County.
11 (**Exhibit 7**, at 103:15-104:2; **Exhibit 10**.)
- 12 32. And, on November 17, 2015, Brian Barker wrote an email to Dr. John Moffatt,
13 Pima County's Director of Economic Development, and Phil Swaim stating: "Not
14 feeling too good about our chances."
- 15 33. Mr. Barker later explained that his reference to "our chances" meant the chances
16 of retaining World View's operations in Pima County. (**Exhibit 8**, at 24:6-25:5.)
- 17 34. Around Thanksgiving 2015, Dr. Moffatt became aware that World View was
18 likely to accept the County proposal. (**Exhibit 6**, at 78:15-21.)
- 19 35. It was not until December 23, 2015, however, that World View committed in
20 writing to the basic terms of a deal with Pima County. (**Exhibit 7**, at 104:3-10;
21 **Exhibit 12**, December 23, 2015 Letter from Jane Poynter to C.H. Huckelberry.)
- 22 36. Included in that letter under the heading "Assumptions, Terms & Conditions for
23 Project Curvature Contract Acceptance" was: "The company will move into a new
24 building under lease contract with Pima County . . . *by approximately November*
25 *2016*." (**Exhibit 12**, at pimacounty002194.)
- 26 37. The letter also provided: "World View anticipates being operational and 'fully

1 moved in' to the new corporate headquarters in approximately November 2016.
2 All jurisdictions will assure their terms and conditions are aligned to ensure that
3 World View customer contracts and requirements are fully met." (**Exhibit 12**, at
4 pimacounty002196.)

5 38. Failure to meet World View's timeline would have resulted in "considerable"
6 consequences to the County, specifically that World View would relocate to
7 another state. (**Exhibit 7**, at 37:17-21, 105:6-22; *see also* **Exhibit 20**, Lease-
8 Purchase Agreement, at 2, §§ 1.3 ("County is willing to construct certain
9 improvements ...in an accelerated manner") and 1.7 ("World View explored
10 several possible sites for its operations outside of Arizona, but has agreed to locate
11 its expanded operation in Tucson. It would not have agreed to do this without
12 County's willingness to enter into and fulfill its obligations under this Lease and
13 the Space Port Agreement.").)

14 Meeting World View's Timeline

15 39. To comply with World View's timeline, the County had to go from preliminary
16 design and cost estimates to a fully designed, completed, and occupied structure in
17 less than a year. (*See* **Exhibit 8**, at 21:13-23:1, 78:3-79:24; **Exhibit 9**, at 45:21-
18 46:3; **Exhibit 12**, at pimacounty002194, 002196.)

19 40. This timeframe was variously described as "fast," "tight," "aggressive," "one of
20 the fastest project schedules I've ever seen," and "pretty much a record setter."
21 (**Exhibit 7**, at 88:10-14; **Exhibit 8**, at 21:20-22:4, 87:10-19; **Exhibit 9**, at 59:16-
22 18.)

23 41. "Most construction contracts on new buildings [provide for completion] no sooner
24 than typically 18 to 24 months." (**Exhibit 7**, at 88:13-14.)

25 42. "[U]sing a conventional process, [the County] would not have been able to meet
26 the deadlines established by World View as obtaining an operational building."

1 (Exhibit 7, at 89:21-24.)

2 43. Had an architect other than Swaim taken over in January 2016, the architect would
3 not have been able to use Swaim's preliminary drawings, and would have needed
4 time to get up to speed on the project. (Exhibit 9, at 38:8-40:20.)

5 44. Similarly, a contractor other than Barker would have lacked Barker's prior
6 knowledge, would have been "back at the drawing board," and would, "[f]or the
7 largest part," have needed to "come in and redo all the work [Barker] had done
8 already." (Exhibit 8, at 61:21-62:4, 63:24-64:4.)

9 **The County Administrator's Recommendation and Board Approval**

10 45. Mr. Huckelberry prepared a memorandum dated January 19, 2016 in preparation
11 for the Board of Supervisors' consideration of several items related to World View
12 on that date, including the proposed Swaim and Barker contracts. (*See generally*
13 **Exhibit 4.**)

14 46. That memorandum includes a section providing the County Administrator's
15 rationale for recommending direct selection of Swaim and Barker, emphasizing
16 "the required facility delivery date of November 2016" and Swaim's and Barker's
17 "prior involvement and detailed understanding of World View requirements."
18 (**Exhibit 4**, at 7-8; *see also* **Exhibit 2**, at 1, third "Whereas" clause; **Exhibit 3**, at
19 1, fourth "Whereas" clause.)

20 47. The January 19, 2016 memorandum further provided: "[T]he County will now
21 select Swaim Associates, Ltd. as the Project Architect and Barker Morrissey
22 Contracting as the Contractor using the authority granted under A.R.S. § 34-606
23 Emergency Procurement and Section 11.12.060 of the Pima County Procurement
24 Code, whereby the County has determined that due to the compressed timeframe
25 for design and construction of this facility, compliance with the full provisions of
26 the statute is impracticable and contrary to the public interest. It has been

1 determined that the most expedient contract methodology for delivery of the
2 facility is award of the Architectural Design Contract to Swaim Associates, Ltd.
3 and a Construction Manager at Risk Contract to Barker Morrissey Contracting,
4 Inc. for phased construction with multiple Guaranteed Maximum Price proposals
5 as the project design progresses.” (**Exhibit 4**, at 7-8.)

6 48. On January 19, 2016, the Board of Supervisors voted 4-1 to approve the
7 recommended contract awards. (**Exhibit 4**, at pimacounty000022-23.)

8 49. Also on January 19, 2016, the Board voted 4-1 to approve two agreements with
9 World View, each of which included findings that—based on an outside
10 economic-impact study—World View’s operations would “have a significant
11 positive impact on the economic welfare of Pima County’s inhabitants” and that
12 World View would not have agreed to remain in Pima County had the County not
13 agreed to build the Facility on an accelerated basis. (**Exhibit 20**, at 1-2, §§ 1.3,
14 1.7, and 1.8; **Exhibit 21**, Space Port Operating Agreement, at 1, §§ 1.3, 1.6, and
15 1.7.)

16 **Completion of the Facility and Launch Pad**

17 50. The Facility was substantially completed on December 23, 2016. (**Exhibit 13**,
18 Certificate of Substantial Completion.)

19 51. The Facility received a temporary certificate of occupancy on December 23, 2016,
20 and a permanent certificate of occupancy on February 8, 2017. (**Exhibit 10**,
21 Temporary Certificate of Occupancy; **Exhibit 11**, Certificate of Occupancy.)

22 52. World View Enterprises, Inc. is currently occupying, and conducting business
23 operations in, the Facility. (**Exhibit 12**, Affidavit of Carter Volle (February
24 2017).)

25 53. The Swaim contract provided that the County would pay Swaim not to exceed
26 \$726,595.00 for its services. (**Exhibit 1**, at 2.)

1 54. Swaim has been paid a total of \$667,709, which is the sum total of what the
2 County will pay Swaim under the contract. (**Exhibit 17**, Aff. of Carter Volle
3 (4/30/2018), ¶¶ 7, 9.)

4 55. The Barker contract has an amended guaranteed maximum price of
5 \$12,399,659.41. (**Exhibit 4**, Amendment 7 to Barker Morrissey Contract, at 1.)

6 56. Barker has been paid a total of \$12,334,531, which is the sum total of what the
7 County will pay Barker under the contract. (**Exhibit 17**, ¶¶ 8-9.)

8 57. The County does not anticipate further payments to Swaim or Barker under the
9 contracts. (**Exhibit 17**, ¶ 9.)

10 **This Suit and the Plaintiffs**

11 58. On March 28, 2016, the Goldwater Institute sent a letter to Board of Supervisors'
12 Chair Sharon Bronson, asserting in part that the selection of Swaim and Barker
13 violated A.R.S. Title 34 and the Pima County Procurement Code. (**Exhibit 18**.)

14 59. On April 14, 2016, Plaintiffs filed this suit, and in Counts 3 and 4 challenged the
15 Swaim and Barker Morrissey contracts, contending they were awarded in violation
16 of state statutes and the Pima County Code. (**Compl.**, ¶¶ 82-98.)

17 60. During the course of this suit to date, Plaintiffs have never sought a preliminary
18 injunction. (*See generally* Docket for C20161761.)

19 61. The Plaintiffs are Pima County taxpayers. (**Compl.**, ¶¶ 7-9.)

20 RESPECTFULLY SUBMITTED May 4, 2018.

21 BARBARA LAWALL
22 PIMA COUNTY ATTORNEY

23 By: /s/ Andrew L. Flagg
24 Regina L. Nassen
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CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2018, I electronically transmitted the attached document to the Clerk's Office using the TurboCourt System for filing and transmittal of a Notice of Electronic Filing to the following TurboCourt registrants:

Honorable Judge Catherine Woods
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